

**Indexed as: Kaplan, N.S. (Re)**

**THE DISCIPLINE COMMITTEE OF THE COLLEGE  
OF PHYSICIANS AND SURGEONS OF ONTARIO**

**IN THE MATTER OF** a Hearing directed  
by the Executive Committee of  
the College of Physicians and Surgeons of Ontario  
pursuant to Section 36(1) of the **Health Professions Procedural Code**  
being Schedule 2 of the *Regulated Health Professions Act, 1991*,  
S.O. 1991, c. 18, as amended.

**B E T W E E N:**

**THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO**

**- and -**

**DR. NIKOLAY SEMIONOVICH KAPLAN**

**PANEL MEMBERS:**

**DR. M. GABEL  
DR. E. ATTIA (Ph.D.)  
DR. P. HORSHAM  
U. DEOL  
DR. E. STANTON**

**Hearing Date: November 10, 2009  
Decision Date: November 10, 2009  
Release of Written Reasons: December 23, 2010**

## DECISION AND REASONS FOR DECISION

The Discipline Committee of the College of Physicians and Surgeons of Ontario (the “Committee”) heard this matter at Toronto on November 10, 2009. At the conclusion of the hearing, the Committee stated its finding that the member committed acts of professional misconduct and delivered its penalty and costs order of November 10, 2009 with written reasons to follow.

On August 23, 2010, counsel for the parties appeared before the Committee to make submissions regarding the implementation of the Order that was made on November 10, 2009, in particular paragraph 2 of the Order which imposed a suspension. As further discussed below, the parties wished to clarify for the Committee the information in paragraph 2(a) of the Order that Dr. Kaplan’s certificate of registration was “effectively suspended since October 31, 2008”. In fact, Dr. Kaplan’s certificate of registration had expired as of October 31, 2008 and, therefore, directions were necessary regarding how the Committee’s order was to be implemented.

### THE ALLEGATIONS

The Notice of Hearing alleged that Dr. Kaplan committed acts of professional misconduct:

1. under paragraph 1(1)33 of Ontario Regulation 856/93 made under the *Medicine Act, 1991* (“O. Reg. 856/93”), in that he has engaged in conduct or an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional;
2. under clause 51(1)(a) of the Health Professions Procedural Code, which is Schedule 2 to the *Regulated Health Professions Act, 1991*, (“the Code”) in that he has been found guilty of an offence that is relevant to his suitability to practice;
3. under paragraph 1(1)1 O. Reg. 856/93, in that he contravened a term, condition or limitation on his certificate of registration; and

4. under paragraph 1(1)2 of O. Reg. 856/93, in that he failed to maintain the standard of practise of the profession.

The Notice of Hearing also alleged that Dr. Kaplan is incompetent as defined by subsection 52(1) of the Code, in that his care of patients displays a lack of knowledge, skill or judgment or disregard for the welfare of his patients of a nature or to an extent that demonstrates that he is unfit to continue practise or that his practice should be restricted.

### **RESPONSE TO THE ALLEGATIONS**

On November 10, 2009, Dr. Kaplan admitted the first, second, and fourth allegations in the Notice of Hearing: that he has engaged in conduct or an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional; that he has been found guilty of an offence that is relevant to his suitability to practice; and that he failed to maintain the standard of practice of the profession.

Counsel for the College withdrew the third allegation in the Notice of Hearing and the allegation of incompetence.

### **FACTS AND EVIDENCE**

The following Agreed Statement of Facts was filed as an exhibit and presented to the Committee on November 10, 2009:

#### ***Assault***

1. On October 26, 2005, Dr. Kaplan picked up a woman in his vehicle. The woman was a prostitute.
2. Dr. Kaplan and the woman agreed that he would provide her with money, and she agreed to engage in sexual activity with him.
3. Prior to engaging in the sexual activity, the woman left Dr. Kaplan's vehicle.

4. Dr. Kaplan caught up with the woman, got out of his vehicle, and physically assaulted her.
5. On or about December 6, 2006, Dr. Kaplan pleaded guilty to assault contrary to the Criminal Code of Canada; findings of fact in relation to the assault were made on February 14, 2007. Dr. Kaplan was found guilty of assault which included hitting and kicking. On or about September 13, 2007 Dr. Kaplan was sentenced in respect of this offence.

***Failure to Disclose Assault***

6. Dr. Kaplan failed to disclose the charges to the Medical Advisory Committee, the Credentialing Committee or the Chief of Staff at an Ontario hospital, and made misrepresentation on his re-appointment application to that hospital for two consecutive years.
7. Specifically, on Dr. Kaplan's annual Hospital Reappointment Applications in 2006 and 2007, he answered "no" to the following questions:  
  
*Have you been a defendant in any civil or criminal law suit alleging negligence, incompetence, assault, battery, sexual misconduct, OR that arose in any way from your professional practice OR that is in any way relevant to the practice of medicine, dentistry, midwifery, or nursing in the past year?*  
  
*Have you had any criminal or civil actions in a preceding year or pending?*
8. Dr. Kaplan answered "no" to these questions, when he should have answered "yes", given that he was charged with assault on December 10, 2005, pleaded guilty to assault on December 6, 2006 and was found guilty of assault on February 14, 2007.
9. Dr. Kaplan failed to advise the College, when asked in writing, on his 2005 and 2006 Annual Renewal Forms that he was facing criminal charges arising out of the October 26, 2005 incident described above.

10. Specifically, on his 2005 and 2006 annual renewal forms, he was asked the following question:  
*Have you ever been found guilty or are you charged with an offence in Canada or elsewhere relevant to your suitability to practice medicine?*
11. Dr. Kaplan states that when he filled out the annual renewal forms, he did not believe that the conviction for assault, as described above, was relevant to his suitability to practice medicine.

### ***Failure to Maintain the Standard of Practice of the Profession***

12. Dr. Kaplan's care and treatment of 22 patients, in both his inpatient and outpatient practice, fell below the standard of practice including, but not limited to, his incomplete and inadequate documentation, management of hypertension, lack of follow up with respect to abnormal lab results and his use of certain combinations of anti-hypertensive medications.
13. The College retained the services of a general internist, Dr. Z, to review 36 patient charts obtained from Dr. Kaplan's clinic and hospital practices, as well as a further single chart of a patient. Dr. Z opined on the 36 patient charts and prepared a report, dated November 2008. Dr. Z also prepared an addendum, dated January 12, 2009, relating to the single patient. Copies of the two reports are attached at Tab 1 [to the Agreed Statement of Facts].
14. Dr. Kaplan provided written submissions in response to Dr. Z's reports. A copy of his submissions are attached at Tab 2 [to the Agreed Statement of Facts].

### ***Admission***

1. Dr. Kaplan admits that the conduct set out above constitutes professional misconduct, and admits:
  - (a) that he engaged in conduct or acts and omissions relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional;

- (b) that he has been found guilty of an offence that is relevant to his suitability to practise; and
- (c) that he failed to maintain the standard of practice of the profession.

## **FINDINGS**

On November 10, 2009, the Committee accepted as true all of the facts set out in the Agreed Statement of Facts, and accepted Dr. Kaplan's admission. Having regard to these facts, and on hearing submissions of counsel for the College and counsel for Dr. Kaplan, the Committee found that Dr. Kaplan committed acts of professional misconduct, in that: he has engaged in conduct or an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional; he has been found guilty of an offence that is relevant to his suitability to practice; and he has failed to maintain the standard of practice of the profession.

## **PENALTY AND REASONS FOR PENALTY BASED ON SUBMISSIONS OF NOVEMBER 10, 2009**

The Committee reviewed the Agreed Statement of Facts, the proposed Order that was jointly submitted as to an appropriate penalty and costs, documents in support of the joint submission including the reports of Drs. S, H, and Z, and the advice of independent legal counsel. The Committee is aware that the law provides that the Committee should accept a joint submission unless to do so would be contrary to the public interest and would bring the administration of justice into disrepute

The jointly-proposed Order consisted of a public reprimand, completion of the Medical Record-Keeping course, a twelve-month suspension of Dr. Kaplan's certificate of registration (nine months to be suspended in consideration of his certificate of registration having been [as phrased by the parties] "effectively suspended" since October 31, 2008 and upon making himself available within thirty days to schedule his participation in the

Medical Ethics and Informed Consent course), and costs of \$3,650, all to be recorded on the public register.

The Committee carefully considered the facts giving rise to the finding and the joint submission. The Committee agreed that the penalty principles that apply are the protection of the public, denunciation of the conduct and specific and general deterrence. The Committee agreed that Dr. Kaplan's serious misconduct of violence against a stranger and dishonesty were extremely serious matters which bring disrespect to the profession and therefore warrant a serious sanction. In addition, the clinical concerns were serious matters.

Counsel for the College and counsel for Dr. Kaplan reviewed the following prior decisions of the Committee that involved similar acts of professional misconduct: *Freeman* [2008]; *Georgantopoulos* [2007]; *Pandhi* [2001]; *Prebtani* [2005]; *Sewchand* [2001]; *Tesher* [2002] and *Vasic* [2009]. The penalties in these cases ranged from a reprimand to a twelve-month suspension (three months to be suspended with the completion of the College's Medical Ethics Course). Each of the cited cases addressed an allegation of either dishonesty or violence. In this matter, Dr. Kaplan admitted multiple allegations related to dishonesty, violence and clinical care.

In considering the proposed penalty, the Committee had regard to the following:

- 1) Violent behaviour towards others, as well as concealing information from medical and regulatory authorities, cannot be tolerated or considered lightly by the Committee. In order to maintain the public trust, members of the College must maintain the standard of practice of the profession as well as the highest standard of integrity.
- 2) Dr. Kaplan pleaded guilty to a charge of assault (which included hitting and kicking) and was convicted in a criminal court on December 6, 2006.
- 3) Dr. Kaplan takes responsibility for his actions, was remorseful and apologized for his errors in judgement. He has also faced embarrassment and humiliation from extensive media coverage.

- 4) Dr. Kaplan has attended counselling for over two years.
- 5) Dr. Kaplan has signed an undertaking to practise internal medicine under the guidance of a clinical supervisor and to undergo a specialties assessment by a medical assessor appointed by the College.
- 6) Dr. Kaplan's admission obviated the need for a potentially lengthy and costly hearing.
- 7) Dr. Kaplan has no prior discipline history.
- 8) Dr. Kaplan has undergone psychiatric assessments by Dr. S on April 10, 2007 and March 19, 2009. Based upon his March 19, 2009 assessment, Dr. S stated that Dr. Kaplan "is not a danger to his patients or the public." He also stated that "there is no evidence of sexual deviation or any particular problems with women in his background" and that "it is unlikely that this [offence] would be repeated." Dr. S concludes his report by stating that Dr. Kaplan "is motivated to pay back the wrongs he has caused by contributing to society in the future. In my opinion, he is fully capable of doing so."

Dr. Kaplan also had a psychological assessment by Dr. H on September 8, 2009. Dr. H stated in his findings that "the risk for re-offending was negligible."

- 9) Dr. Kaplan had not practised since October, 2008. As further discussed below the reason for that situation was not properly understood by the Committee on November 10 when it was told he had been "effectively suspended".

On November 10, 2009 the Committee concluded that the joint penalty submission properly reflects the abhorrence of Dr. Kaplan's conduct, fulfils the objectives of general and specific deterrence and is consistent with the case law referred to in the authorities submitted. In addition, the circumstances which gave rise to Dr. Kaplan's criminal conviction appear unlikely to be repeated. Finally, this penalty addresses the need to protect the public with regard to Dr. Kaplan's practise of internal medicine, while at the same time recognizing the importance of rehabilitation.

**ORDER OF NOVEMBER 10, 2009**

Therefore, on November 10, 2009, the Committee ordered and directed that:

1. The Registrar impose the following term, condition and limitation on Dr. Kaplan's certificate of registration:
  - a) Dr. Kaplan shall successfully complete the College's Medical Record-Keeping for Physicians course and the follow-up component at the earliest available date and shall provide proof of same to the College upon completion.
2. The Registrar shall forthwith suspend Dr. Kaplan's certificate of registration for a period of twelve (12) months. The Registrar shall suspend nine (9) months of this suspension:
  - a) In consideration of the fact that Dr. Kaplan's certification of registration has been effectively suspended since October 31, 2008; and
  - b) On the condition that Dr. Kaplan make himself available to College staff within thirty (30) days of the date of this Order to schedule his participation in the Medical Ethics and Informed Consent course; and that he fully cooperate with the scheduling and attendance of this course at the earliest available date.
3. Dr. Kaplan appear before the Committee to be reprimanded, with the fact of the reprimand recorded on the register.
4. Dr. Kaplan pay costs to the College in the amount of \$3,650 within ninety (90) days from the date of the Order.
5. The results of this proceeding be included in the register.

At the conclusion of the hearing, Dr. Kaplan waived his right to an appeal under subsection 70(1) of the Code and the Committee administered the public reprimand.

**SUBMISSIONS OF AUGUST 23, 2010**

On August 23, 2010, counsel informed the Committee that Dr. Kaplan's certificate of registration had not been renewed when it expired on October 31, 2008 so that paragraph 2 of the November 10, 2009 Order requiring a suspension could not be implemented on that date. As Dr. Kaplan's certificate of registration had expired, there was nothing to suspend. Therefore, although Dr. Kaplan could not practise without a certificate, it was not accurate to characterize the status of his certificate as "effectively suspended" as of October 31, 2008.

There were discussions between the parties regarding what change, if any, should be made to the Order in light of the true state of affairs regarding Dr. Kaplan's certificate of registration. When the parties could not agree, they requested that the Committee reconvene to hear submissions with respect to what should be done to implement the Order.

The College submitted that that the "net" three month suspension in question should commence if and when Dr. Kaplan's certificate of registration is reinstated. The College submitted that this is consistent with the manner in which other suspensions or terms, conditions and limitations would be imposed when a member does not currently hold an active certificate. It was the position of the College that, given that both parties knew that Dr. Kaplan's certificate of registration had expired, it was always contemplated that the net three month suspension would be served when Dr. Kaplan regained a certificate. The College also provided its interpretation of the term "forthwith", which appears in the order in relation to the three month suspension. The College submitted that "forthwith" always meant that, as soon as Dr. Kaplan regained his certificate of registration, the Registrar was to suspend his certificate of registration forthwith rather than suggesting it was to begin as of the date of the order.

Counsel for Dr. Kaplan submitted that, if it had been the intention of either of the parties or the Committee to delay application of the net three month suspension until such a time when Dr. Kaplan was re-issued his certificate of registration, the Order would have been

worded differently. Specifically, rather than taking effect “forthwith”, it would have provided for an effective date such as “on such date as Dr. Kaplan successfully renews his certificate of registration...”, or some variation thereof. Counsel for Dr. Kaplan also submitted that, when Dr. Kaplan agreed to the joint submission on penalty, it was his understanding and expectation that the suspension would commence immediately and run for twelve months, nine months of which would be suspended upon successful completion of the Medical Ethics and Informed Consent course, during which time Dr. Kaplan would be free to make efforts to re-instate his certificate of registration. Counsel submitted that Dr. Kaplan’s intention was to serve his suspension while his application for a new certificate was being considered by the Registration Committee. Counsel for Dr. Kaplan also argued that, if it had been the intention of the College to stay the implementation of the suspension until Dr. Kaplan’s certificate was reinstated, the College would have made this clear in the joint submission and the joint submission would have been presented so as to give effect to this intention. Counsel for Dr. Kaplan also submitted that it is clearly stated in the last line of the Notice of Suspension signed by the Registrar of the College that the three month suspension commenced at 11.59 pm on November 10, 2009.

The College submitted that the net three month suspension was meaningless unless it is served once Dr. Kaplan has a certificate of registration. The College further submitted that, if the Committee deems Dr. Kaplan’s suspension to be served, it would in effect be departing from the joint submission and allowing Dr. Kaplan to evade the sanction aspect of the Discipline Committee’s order that directed the Registrar to impose a suspension.

Counsel for Dr. Kaplan replied that, should the College’s approach be adopted (i.e., the suspension takes effect if and when Dr. Kaplan’s Certificate is reinstated), this would amount to an effective term that is much longer than the 12 month suspension provided for in the November 10, 2009 Order.

**DECISION AND REASONS ON INTERPRETING PARAGRAPH 2 OF THE ORDER IMPOSING A SUSPENSION**

The Committee carefully considered the further submissions made on August 23, 2010 on behalf of the College and Dr. Kaplan as well as the advice of independent legal counsel.

In considering this matter, the Committee finds itself in a position similar to Justice Robert Jackson of the United States when, on reversing himself, he stated “The matter does not appear to appear to me now as it appears to have appeared to me at the time”.

Counsel for the College and Dr. Kaplan have now clarified not only the facts forming the foundation of the joint submission on penalty but, as well, that each has a different understanding of the operation of the term that required a suspension of Dr. Kaplan’s certificate of registration.

On August 23, 2010, counsel for the College informed the Committee that Dr. Kaplan had applied for a renewal of his certificate of registration but the Registration Committee, which deals with such applications, decided not to deal with the application pending the outcome of the discipline hearing. As a practical consequence of this decision, Dr. Kaplan was not in a position to have his application for renewal of his certificate considered until after the decision of this Committee was rendered. Because of the disagreement of the parties as to what was intended by their jointly proposed order, and the language of that Order, a further attendance was required before and additional submissions to the Committee made as to its proper interpretation for implementation.

Counsel for the College and Dr. Kaplan understood the phrase “effectively suspended” as used by them in November 2009 and in paragraph 2(a) of the November 2009 jointly proposed Order to refer to an expired certificate of registration. However, the Committee had not been informed by counsel and did not appreciate that “effectively suspended” referred to an expired and not a suspended certificate as the term “expired” was never explicitly stated in the written or oral submissions. Therefore, when the Committee made and signed the Order of November 2009, it did so based upon its understanding that Dr. Kaplan’s certificate of registration was “suspended”, and not that it had “expired”.

This raises two issues. First, to properly discharge its duty, the Committee must be provided with, and be able to rely upon, a joint submission that contains facts which are accurate and unambiguous. Second, the Committee must rely on the presupposition that the parties have come to a mutually agreed upon understanding of the operation of the terms of the joint submission. That is, that the jointly submitted Order is actually agreed upon by both parties.

In considering this matter, the Committee accepted Dr. Kaplan's position that it was his understanding when he agreed to the joint submission on penalty that the net three month "suspension" would commence on November 10, 2009. In other words, he understood that he would not be permitted to practise medicine during a three month period commencing November 10, 2009 whether or not his certificate of registration was renewed. We must observe that, while we accept that this was Dr. Kaplan's understanding, it was clearly a faulty one. When there is no certificate, it is inapt to talk of a suspension. There is nothing to suspend. Without a certificate of registration, he simply cannot practice.

The Committee wishes to observe that there are circumstances where the Committee does make orders that cannot be implemented strictly in accordance with their terms as of the date of the order. For example, even though a member may have resigned or let his or her certificate expire, the Committee nonetheless retains jurisdiction under s. 14 of the Code to revoke, suspend or impose terms, conditions and limitations immediately on a certificate of registration for a finding of professional misconduct (or incompetence) referable to the time when he or she was a member. Nothing in the Order in this case should be construed as affecting such situations or otherwise affecting the usual administrative practices and procedures regarding the implementation of discipline orders.

In this matter, it is apparent from the submissions of counsel that, although there was a joint submission on November 10, 2009, there was no common understanding regarding when the term of the suspension was to commence. Therefore, we have considered the length of the suspension and its implementation on the basis that this aspect of the Order

is contested by the parties so that we must consider it with reference to the principles for setting a penalty.

In considering the submissions with respect to the appropriate length of any suspension, when it should commence, and how to interpret the November 2009 order, the Committee was mindful that an appropriate penalty should serve as a both general deterrent to others and as a specific deterrent to Dr. Kaplan. On the facts of this case, the Committee is satisfied that the twelve month suspension proposed is an appropriate deterrent for Dr. Kaplan's serious misconduct. Given the very unusual circumstances here, the Committee is of the view that the twelve month suspension should be suspended if and when Dr. Kaplan receives a certificate of registration, provided that he otherwise complies with the November 2009 Order of the Committee. Dr. Kaplan has not been in a legal position to practise medicine for an additional time period of 12 months after the November 2009 Order. In part, this was the result of the parties fundamental disagreement as to when the term of suspension was intended to commence in the jointly proposed order and the need to return to the Committee to ask for clarification. In part, it was because the Registration Committee has deferred a decision on Dr. Kaplan's application for reinstatement pending this decision.

The Committee wishes to be clear that the facts of this case are highly unusual. Each case must be determined on its facts and an appropriate penalty ordered. The Committee does not wish to be taken as making any statement of principle in this case with respect to how a doctor's inability to practise due to the expiration of a certificate is to be dealt with in relation to a suspension of a certificate of registration. Nor should our decision be taken as expressing a view on how the Registration Committee should proceed on Dr. Kaplan's application to them for a renewal of his certificate of registration. They have an independent jurisdiction to exercise, as does the Discipline Committee. We are only dealing with the proper interpretation of the term in the November 2009 Order imposing a suspension in the specific and unusual circumstances of this case.

**DIRECTION**

The jointly proposed order had a provision in it reducing the suspension from 12 months to 9 months, taking into account “that Dr. Kaplan’s certificate of registration has been effectively suspended since October 31, 2008”. In interpreting the Order for purposes of implementation, we are taking into account that there has been an additional 12 months after the November 2009 order when Dr. Kaplan has not been able to practise medicine.

Accordingly, it is our view and direction that, if and when Dr. Kaplan’s certificate of registration is renewed by the College, the 12 month suspension shall be treated as suspended, provided that he otherwise complies with the terms of the November 2009 order.